

The Appeals Board considered the record and adopted the stipulations listed in the Award.

ISSUES

The respondent requested Appeals Board review of the following issues:

- (1) Whether claimant suffered an accidental injury that arose out of and in the course of her employment on October 4, 1993.
- (2) Nature and extent of claimant's disability.
- (3) Whether claimant is entitled to payment for outstanding medical bills.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record, considering the briefs, and hearing the arguments of the parties, the Appeals Board finds as follows:

- (1) The Assistant Director found claimant had suffered an injury to her low back while lifting a severely handicapped child at work on October 4, 1993. The Appeals Board approves that finding and concludes that the Assistant Director's findings and conclusions in regard to that issue are accurate and appropriate. Therefore, the Appeals Board adopts such findings and conclusions in regard to that issue as its own.
- (2) The Assistant Director found the claimant was entitled to a work disability of 70.6 percent based on the "new act" provisions of K.S.A. 44-510e(a). The Assistant Director rejected respondent's argument that claimant should be restricted to her percentage of functional impairment because she refused to perform an accommodated job offered by the respondent to claimant within her permanent work restrictions. The respondent argued the principles set forth by the Kansas Court of Appeals in the case of Foulk v. Colonial Terrace, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995) apply to the facts of this case. The Assistant Director in rejecting respondent's argument, found that unlike the claimant in Foulk, who refused to even attempt the accommodated job, the claimant in this case attempted but was unable to perform the job duties because of the injury. The Appeals Board agrees with that conclusion.

The Assistant Director found that claimant had a 41.2 percent loss of work tasks that she had performed in 15 years preceding her work accident. That finding was based on the testimony of a physician, Lawrence R. Blaty, M.D., as required by K.S.A. 44-510e(a) and whose opinion was uncontradicted.

The current wage loss component of the work disability test contained in K.S.A. 44-510e(a) is measured on the basis of "the difference between the average weekly wage the worker was earning at the time of injury and the average weekly wage the worker is earning after the injury." The Assistant Director went on to find, that since the claimant was

not working at the time of the regular hearing, the wage loss component of the current work disability test was 100 percent. Although claimant was unemployed, the Appeals Board disagrees with the finding of the Assistant Director that she is entitled to a wage loss of 100 percent. The claimant testified at the regular hearing she had not attempted to even apply for a job following her attempt to return to the job offered by the respondent in November 1994 and her release from her treating physician's care on December 13, 1994. At that time, Robert L. Eyster, M.D., released claimant to return to work with permanent lifting restrictions of no repetitive lifting over 25 pounds. The record does not contain any evidence that the claimant cannot work. In fact, when Dr. Blaty expressed his opinion on claimant's work tasks loss he made a determination that the claimant was capable of performing 10 of the 17 work tasks she had performed in the 15 years preceding her accident. The Appeals Board finds the claimant has voluntarily removed herself from the labor market without good reason. Accordingly, the Appeals Board concludes, as it did in Wollenberg v. Marley Cooling Tower Company, Docket No. 184,428 (Sept. 1995), that a post-injury wage should be imputed to the claimant in computing the wage loss component of the work disability test. In the instant case, the record does not contain evidence as to claimant's post-injury wage earning ability. Therefore, the Appeals Board finds an appropriate wage to impute to the claimant would be the minimum wage rate of \$4.25 per hour or \$170 per week through September 30, 1996, and thereafter \$4.75 per hour or \$190 per week effective October 1, 1996, when the minimum wage was increased by law.

The parties stipulated to claimant's pre-injury average weekly wage in the amount of \$181.89. Comparing the \$181.89 post-injury wage to the weekly minimum wage, the Appeals Board finds the post-injury minimum wage amounts are more than 90 percent of claimant's pre-injury wage. Accordingly, the Appeals Board finds the conclusive rule contained in the "new act" applies and the claimant is limited to permanent partial disability benefits based on her functional impairment for the weeks after her attempt to return to the job offered by the respondent and following her release by Dr. Eyster on December 13, 1996.

The Appeals Board further finds the claimant is entitled to a work disability from her date of accident, October 4, 1993, until she was released with permanent restrictions from Dr. Eyster on December 13, 1994. The evidence establishes the claimant was not working during that period except for the day-and-a-half she attempted to return to the job offered by the respondent in November 1994. Therefore, the wage loss component of the work disability test would be 100 percent averaged with the work tasks loss component of 41.2 percent entitling claimant to a work disability as found by the Assistant Director in the amount of 70.6 percent. Thereafter, the claimant is eligible for permanent partial disability benefits based on functional impairment in the amount of 7 percent. The 7 percent functional impairment rating is found by averaging the three physicians' opinions who testified in this case in regard to functional impairment, Dr. Blaty's 9 percent, Dr. Eyster's 5 percent, and Dr. Mills' 7 percent.

(3) The claimant admitted into evidence at the regular hearing a medical statement for treatment she received on November 15, 1994, at St. Francis Hospital emergency room in Wichita, Kansas, in the amount of \$113 and a medical bill from St. Joseph Medical Center for a CT scan and myelogram ordered by claimant's treating physician, Dr. Eyster, in the amount of \$2,424.65. Claimant requested these medical bills be ordered paid by the respondent as authorized medical treatment. The Assistant Director did not address this request in his Award. The Appeals Board finds both of these medical bills were for the treatment of claimant's work-related back injury and therefore orders respondent to pay both bills.

All other findings and conclusions made by the Assistant Director in his Award that are not inconsistent with the above are adopted by the Appeals Board.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Assistant Director David A. Shufelt dated May 31, 1996, should be, and is hereby, modified and an award is entered as follows:

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Evangelina G. Lerma, and against the respondent, Rainbows United Inc., and its insurance carrier, Continental Insurance Company, for an accidental injury which occurred on October 4, 1993, and based upon an average weekly wage of \$181.89.

Claimant is entitled to 25.14 weeks of temporary total disability at the rate of \$121.27 per week or \$3,048.73 through March 29, 1994, followed by 37 weeks of permanent partial disability compensation at the rate of \$121.27 per week or \$4,486.99, through December 13, 1994, for a 70.6% general work disability making a total award of \$7,535.72, which is all due and owing less any amounts previously paid.

Effective December 14, 1994, claimant is entitled to a 7% permanent partial general disability based on functional impairment which has all been previously paid.

Respondent is ordered to pay as authorized medical the emergency room physicians' bill for medical treatment at the St. Francis Hospital emergency room in the amount of \$113 and the bill to St. Joseph Medical Center in the amount of \$2,424.65.

All remaining orders of the Assistant Director are herein adopted by the Appeals Board as its own.

IT IS SO ORDERED.

Dated this ____ day of April 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Garry L. Howard, Wichita, KS
D. Steven Marsh, Wichita, KS
Office of Administrative Law Judge, Wichita, KS
David A. Shufelt, Assistant Director
Philip S. Harness, Director